Law Enforcement Digest

January 1997

HONOR ROLL

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453rd Session, Basic Law Enforcement Academy - September 5 through November 26, 1996

President:	Officer Eric D. Pierce - Yakima Police Department
Best Overall:	Deputy Ryan O. Gausman - Snohomish County Sheriff's Department
Best Academic:	Officer Karen C. Skruch - Washington State Gambling Commission
Best Firearms:	Officer Eric R. Talbot - Royal City Police Department

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454th Session, Basic Law Enforcement Academy - Spokane - September 5 through November 26, 1996

Highest Achievement in Scholarship:	Deputy Michael K. Barnett - Grant Co. Sheriff's Office
Highest Achievement in Night Mock Scenes:	Officer Christopher R. Crane - Spokane Police Dept.
Outstanding Officer:	Deputy Frederick K. Morford - Spokane C.S.O.
Highest Achievement in Pistol Marksmanship:	Officer Douglas A. Orr - Spokane Police Department
Best Overall Firearms:	Officer Matthew D. Steadman - Moxee Police Dept.

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Corrections Officer Academy - Class 239 - October 14 through November 8, 1996

Highest Overall:	Officer Aaron James Baker - Kitsap County Jail
Highest Academic:	Officer Heidi L. Houger - King County Dept of Adult Detention
	Officer Sabrina D. Dideon - King County Dept of Adult Detention
Highest Practical Test:	Officer Donna Marie Amos - Olympia City Detention Facility
	Officer Stephen W. Ellison - Snohomish County Corrections
	Officer Sabrina D. Dideon - King County Dept of Adult Detention
Highest in Mock Scenes:	Officer Aaron James Baker - Kitsap County Jail
Highest Defensive Tactics:	Officer Aaron James Baker - Kitsap County Jail

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Corrections Officer Academy - Class 240 - October 14 through November 8, 1996

Highest Overall:	Officer Adrienne D. King - King County Dept of Adult Detention
Highest Academic:	Officer Kenneth C. Thomas - King County Dept of Adult Detention
Highest Practical Test:	Officer Adrienne D. King - King County Dept of Adult Detention
	Officer Mary K. Lo Priore - King County Dept of Adult Detention
Highest in Mock Scenes:	Officer Pavel V. Ryakhovskiy - Snohomish County Corrections
Highest Defensive Tactics:	Officer Ramon Lopez - Grant County Jail

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JANUARY LED TABLE OF CONTENTS

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BASIC ACADEMY INSTRUCTORS

The Basic Law Enforcement Academy is searching for qualified instructors. Selections will be based on combinations of field experience, specialized training, teaching skills, and the ability to teach, motivate, and role model for recruit police officers. Basic Academy instructors must have a minimum of 5 years full-time, commissioned, experience. Former and current Field Training Officers are encouraged to apply. All applicants must have the endorsement/permission of their agency head prior to applying.

By establishing a list of qualified candidates, the Academy staff will be better prepared to meet increasing demand created through vacancies and potential changes to WAC requirements. Core blocks of instruction are Defensive Tactics, Communication Skills, Traffic, Crisis Intervention, Patrol Procedures, Criminal Investigation, Criminal Law, and Criminal Procedure. The initial commitment for Basic Academy staff members is two years.

Those interested in this opportunity should forward a resume and one page cover letter to: Sergeant Michael Painter, W.S.C.J.T.C., Basic Law Enforcement Academy, 19010 1st Avenue South, Seattle, Washington 98148. If you require additional information, call Sgt. Painter at (206) 439-3740, Ext. 284.

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WASHINGTON STATE SUPREME COURT

RIGHT TO COUNSEL UNDER CrR 3.1: (A) TRIGGERED BY "CUSTODY" AND (B) WAS VIOLATED; NO PREJUDICE FOUND IN VIOLATION, HOWEVER

State v. Copeland, 130 Wn.2d 244 (1996)

Facts:

After developing probable cause to believe that William Copeland had committed a rape-murder a few months earlier, a detective went to Copeland's residence with a search warrant authorizing the taking of biological samples from Copeland. When Copeland refused to voluntarily give samples, the detective arrested Copeland by placing him in handcuffs and taking him to a jail facility where the samples were obtained. At no time prior to the taking of

the samples did the detective give Miranda warnings or other warnings about the right to counsel.

FBI testing of Copeland's biological samples gave an extremely high probability of match to samples which had been taken from the crime scene. Copeland was eventually convicted of murder in a jury trial.

ISSUES AND RULINGS: (1) Was Copeland's "right to counsel" under the court rule, CrR 3.1, triggered when he was handcuffed and taken to the jail facility for the taking of the biological samples covered by the search warrant, and, if so, was the right violated? (ANSWER: Yes and Yes); (2) Assuming Copeland's CrR 3.1 "right to counsel" was violated, was there any prejudice in the detective's failure to give Copeland any warnings as required under the rule? (ANSWER: No) Result: King County Superior Court convictions for first degree murder (premeditated and felony-murder) affirmed; exceptional sentence of 480 months affirmed (sentencing issue not addressed in LED).

ANALYSIS: (Excerpted from Supreme Court opinion)

TRIGGERING CrR 3.1

> Copeland argues that when the officers took him to the Kent City jail on July 26, 1990, and took blood and hair samples from him pursuant to the search warrant authorizing the seizure of such samples, he was denied his right to counsel under CrR 3.1 and the evidence should be suppressed. The trial court, assuming that the right to counsel was violated, held that the evidence was not tainted by the violation.
>
> Under CrR 3.1(a), "[t]he right to [counsel] shall extend to all criminal proceedings for offenses punishable by loss of liberty . . .." CrR 3.1(b)(1) provides that "[t]he right to [counsel] shall accrue as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest."
>
> The parties dispute whether there were any "criminal proceedings" giving rise to a right to counsel within the meaning of CrR 3.1(a), whether Copeland was taken into "custody" within the meaning of CrR 3.1(b)(1), and whether suppression of the evidence is the appropriate remedy for any violation of the CrR 3.1 right to counsel in this case.
>
> The State argues that criminal proceedings have begun only if the defendant has been arrested, and it intends to charge him with a crime. The State argues in this case that Copeland was temporarily detained solely to permit execution of the warrant. The State agrees, though, that Copeland was taken into "custody."
>
> CrR 3.1(b)(1) says the right to counsel "shall accrue as soon as feasible after the defendant is taken into custody . . .." CrR 3.1(c)(1) states that "[w]hen a person is taken into custody that person shall immediately be advised of the right to [counsel] . . .." CrR 3.1(c)(2) states that "[a]t the earliest opportunity a person in custody who desires [counsel] shall be provided access to a telephone . . .." CrR 3.1(b) and (c) clearly contemplate that if Copeland was in custody, the right to

counsel arose. CrR 3.1(a) is not contrary. Its aim is not so much to define when the right accrues but to explain that *all* criminal proceedings are encompassed by the rule: "The right to [counsel] shall extend to all criminal proceedings for offenses punishable by loss of liberty regardless of their denomination as felonies, misdemeanors, or otherwise." CrR 3.1(a). CrR 3.1 does not support the State's argument that "criminal proceedings" begin only when a defendant is arrested with the intent to charge him for a crime. ***See Heinemann v. Whitman County*, 105 Wash.2d 796 (1986)[July '86 LED:06] ("custody" under former JCrR 2.11(b)(1) which provided that the *"right to counsel shall accrue as soon as feasible after the defendant is taken into custody"* same as for *Miranda* purposes). When Copeland was handcuffed and taken to the Kent City jail where the samples were taken, his freedom of movement was restricted. *State v. Sargent*, 111 Wash.2d 641 (1988)[Jan. '89 LED:04] ("freedom of movement" is determinative of "custody" for *Miranda* purposes).**

PREJUDICE FROM 3.1 VIOLATION

Where there is a violation of the court rule right to counsel, the remedy is suppression of evidence tainted by the violation. *State v. Schulze*, 116 Wash.2d 154 (1991)**[April '91 LED:02]**. The trial court ruled that the blood and hair samples were not tainted by any violation of the right to counsel. Copeland maintains, however, that the evidence was tainted in two ways. First, he argues that if counsel had been afforded to him, counsel could have challenged the search warrant before the samples were taken.

In *Schulze*, the defendant was suspected of committing vehicular homicide while under the influence of intoxicants. He argued that he had a right to counsel under CrR 3.1 before submitting to a mandatory blood test. This court said that assuming that the court rule right to counsel had been violated, the blood test results were not tainted by the violation. The court reasoned that even if defendant had contacted his attorney, the attorney could have done nothing except advise defendant to submit to the mandatory testing. Similarly, in this case counsel could not have advised Copeland to refuse to give samples because the warrant was valid. Moreover, even if the warrant was invalid because not supported by probable cause, as Copeland argues, the evidence would be suppressed based upon lack of probable cause to issue the warrant. The right to counsel argument would be immaterial.

Copeland also claims that counsel could have attempted to obtain an order preventing the FBI from destroying the remainder of the DNA sample. The State aptly points out that the destroyed remainder was not from the blood drawn pursuant to the warrant. Thus, whether or not counsel could have obtained an order requiring preservation of the remaining DNA sample is a matter unrelated to evidence obtained from Copeland pursuant to the warrant.

The evidence obtained through execution of the search warrant was not tainted by the violation of the CrR 3.1 right to counsel, and thus the trial court properly denied the motion to suppress based upon an alleged violation of that right.

[Footnote, some citations omitted; bolding emphasis added by LED Ed.]

LED EDITOR'S CROSS REFERENCE NOTE RE ADDITIONAL COPELAND ISSUE: See the LED entry below at page 11 addressing an additional issue in Copeland regarding admissibility of the DNA evidence under the Frye test for scientific evidence.

LED EDITOR'S CROSS REFERENCE NOTE RE WORDING OF CrR 3.1 WARNINGS: See the January 1996 LED entry on State v. Trevino, 127 Wn.2d 735 (1995) Jan. LED at 3-6, for a brief discussion and comparison of (1) the required wording of post-arrest warnings under CrR 3.1, and (2) the required wording of custodial interrogation warnings under Miranda.

LED EDITOR'S COMMENTS ON "CUSTODY" TRIGGER TO THE WARNING REQUIREMENTS OF CrR 3.1 AND MIRANDA:

1. *DOES ANY RESTRAINT ON FREEDOM OF MOVEMENT CONSTITUTE CUSTODY?* **Copeland's majority opinion discussion of the "custody" trigger to the CrR 3.1 warnings requirement, emphasized in bold above in the "Analysis" excerpt, should not be taken out of context. The Court correctly states, based on solid case law, that the "custody" test is the same under Miranda and CrR 3.1. However, the Court is a little loose in its choice of words when it suggests that one is in "custody" under CrR 3.1 and Miranda whenever one's "freedom of movement [is] restricted." The Court cites as authority for this idea the 1988 State Supreme Court decision in State v. Sargent.**

The Sargent case, in turn, relied on two United States Supreme Court decisions which defined "custody" for Miranda purposes - Oregon v. Mathiason, 429 U.S. 492 (1977) and California v. Beheler, 463 U.S. 1121 (1983). Both Mathiason and Beheler make clear that a mere restraint of one's freedom of movement does not constitute "custody" for Miranda purposes. Rather, under Mathiason and Beheler the restraint must be a formal arrest or custody which is "*of the degree associated with a formal arrest*."

2. *DOES FOCUS/PROBABLE CAUSE SUBSTITUTE AS A QUASI-CUSTODY TRIGGER TO WARNINGS REQUIREMENTS?* **Note also that both Mathiason and Beheler make clear that an officer's "focus" on a suspect is irrelevant to the question of whether "custody" exists for Miranda purposes. These two decisions, plus other more recent U.S. Supreme Court decisions, are compelling support for the view that the U.S. Supreme Court has absolutely rejected "focus" as a Miranda trigger under any circumstances.**

However, beginning with the Washington Supreme Court decision in Heinemann v. Whitman County, 105 Wn.2d 796 (1986) July '86 LED:06, and in several subsequent decisions, the Washington appellate courts have on several occasions in the past decade suggested in "dicta" (language in an opinion not necessary to support the decision) that an alternative trigger to the requirement of CrR 3.1 counsel right warnings (and to the Miranda-interrogation warnings) is the combination of focus + deception by police. Thus the Washington cases decided by both the State Supreme Court and the three divisions of the Court of Appeals since Heinemann are uniformly consistent in rejecting "focus/probable cause" alone as a trigger to a warnings requirement, but the cases are inconsistent in relation to a possible "focus + deception" alternative trigger. See, for example, the most recent appellate decision discussing Heinemann-- State v. Ferguson, 76

Wn. App. 560 (Div. I, 1995) May '95 LED:10-- Ferguson flatly rejects the idea that focus/probable cause can be a Miranda trigger, and Ferguson does not mention the "focus + deception" alternative.

Because the U.S. Supreme Court rejected the idea of a "focus" trigger under factual circumstances where deception was clearly present, we are certain that there is no "focus + deception" trigger to Miranda. See the 1977 Mathiason decision where a detective conducting purely voluntary, free-to-leave-at-any-time, questioning lied to the suspect about having matched the suspect's fingerprints to those found at the scene of a burglary. The U.S. Supreme Court has explained that the only relevance of focus in the custody analysis under Miranda is that, if the probable cause information is communicated to the suspect by the officer, then the suspect might reasonably doubt the officer's claim that the suspect is free to leave at any time. See Stansbury v. California, 128 L.Ed.2d 293 (1994) July '94 LED:02.

In light of the foregoing discussion, and in light of the fact that the Washington Supreme Court has consistently declared that Fifth Amendment Miranda protections and parallel state constitutional protections are identical, we believe that a very good argument can be made in the Washington courts that there is no support for any sort of "focus" trigger to the warnings requirement under constitutional or court rule protections. However, in light of Heinemann's dicta, conservative officers may decide against using deception in focus questioning where no Miranda warnings have been given.

In sum, we hope that prosecutors will be vigilant against defense attorneys or trial judges who might read out of proper Miranda context the Copeland majority opinion reference to "restraint on freedom of movement". We hope also for vigilance against unsupported "focus" theories.

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BRIEF NOTES FROM THE WASHINGTON STATE SUPREME COURT

(1) "OUTRAGEOUS GOVERNMENT CONDUCT" CLAIM BY DRUG DEFENDANT SUCCESSFUL IN FIRST-TIME-EVER DUE PROCESS DISMISSAL BY STATE SUPREME COURT – In State v. Lively, 130 Wn.2d 1 (1996), by a close and contentious 5-4 decision, the State Supreme Court rules in a cocaine delivery case that the police conduct was so outrageous that due process protections require dismissal of the charges.

The 5-4 Lively decision is the first-ever decision where any Washington appellate court has accepted a defendant's argument that the government's investigative methods were so outrageous as to require dismissal on constitutional due process grounds of any charges arising out of the investigation. The majority opinion recounts the following "facts", among others, to show outrageousness. [Note: Most of the "facts" were found by the trial court judge in relation to sentencing questions.]

1. Police drug investigators placed an informant in local AA/NA meetings to "troll" for drug law violators. ***LED EDITOR'S NOTE: This apparently was the primary reason for the majority justices' sense of outrage, even though the dissent points out that the police did this***

only after receiving intelligence about "repeaters" using and selling drugs in relation to such AA/NA meetings.

2. The male informant became involved in a close emotional relationship with the defendant (she testified to a sexual relationship, while the informant denied any sexual relations); she was an extremely emotionally vulnerable 21-year-old female who had a history of drug and alcohol problems, but who had been drug-free for several years and alcohol-free in the more recent past. ***LED EDITOR'S NOTE: The dissent points out here that: (1) the police had only limited knowledge of the informant's relationship with the defendant; and (2) the majority affirmed the jury's rejection of defendant's statutory entrapment defense, thus reflecting an acknowledgment by the majority that there was substantial evidence of the defendant's predisposition to commit the crime of delivery of a controlled substance.***

3. At some point prior to the drug delivery at issue, the defendant and informant began living together in an apartment rented with police funds, and the defendant told some acquaintances that she and the informant were going to be married. ***LED EDITOR'S NOTE: Again, the dissent points out that the police had only limited knowledge of the nature of the relationship***.

4. The informant asked the defendant to get cocaine numerous times before she made two 1-gram deliveries of cocaine for cash to an undercover police officer posing as a friend of the informant. ***LED EDITOR'S NOTE: There was apparently little dispute on this allegation.***

The majority opinion asserts that the focus in an "outrageous government conduct" case is on the actions of the government and its agents. The factors to consider are listed in the majority opinion in Lively as follows:

> [W]hether the police conduct instigated a crime or merely infiltrated ongoing criminal activity; whether the defendant's reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation; whether the government controls the criminal activity or simply allows for the criminal activity to occur; whether the police motive was to prevent crime or protect the public; and whether the government conduct itself amounted to criminal activity or conduct "repugnant to a sense of justice."

[Citations omitted]

Determining that the government's conduct was offensive under each of these factors, the five-justice majority concludes, over a strongly worded dissent, that the conduct was so outrageous as to require dismissal of the cocaine delivery charges on due process grounds.

Result: reversal of Walla Walla County Superior Court convictions (two counts) of delivery of controlled substances.

LED EDITOR'S NOTE: The majority opinion is authored by Justice Madsen and concurred in by Justices Dolliver, Smith, Guy, and Pekelis (pro tem). The dissent is authored by Justice Durham and concurred in by Justices Johnson, Alexander, and Talmadge.

LED EDITOR'S COMMENT: Never before has any Washington appellate court dismissed charges based on an outrageous conduct defense. We doubt that Lively signals a trend, though we suspect that defense attorneys will now press the argument more often. Only time will tell, but our best guess is that the Washington courts will continue to routinely reject outrageous conduct claims and will view Lively as an almost unique case confined to its special facts.

(2) POLICE OFFICERS MAY SUE CITIZEN COMPLAINANTS FOR DEFAMATION – In Richmond v. Thompson, 130 Wn.2d 369 (1996), the Washington Supreme Court rejects a citizen's argument in a defamation civil action that the citizen had an absolute privilege to complain against a police officer, even if the complaint was untruthful.

Dr. Woodrow Thompson had made a complaint to the Governor's office, among others, against a WSP trooper, alleging outrageous threatening behavior by the trooper following a traffic stop. After a WSP internal investigation had cleared the trooper, the trooper sued Thompson for defamation.

A jury found in favor of the trooper and awarded $15,000 in damages. Thompson appealed and the Court of Appeals ruled against him, affirming the trial court's judgment on the jury verdict. 79 Wn. App. 327 (Div. I, 1995) **March '96 LED:13**. Now the State Supreme Court has affirmed the Court of Appeals decision.

Dr. Thompson asked the State Supreme Court to rule that a citizen who files a complaint against a police officer has an absolute privilege (extending even to false allegations) under either the U.S. Constitution's First Amendment or the equivalent state constitutional free speech provision. The Supreme Court rejects the theory by a 6-3 vote (Dolliver, Alexander, and Smith dissenting).

Result: King County Superior Court judgment on verdict for Trooper Richmond affirmed.

Dissent: Justice Dolliver writes a dissenting opinion, joined by Justices Alexander and Smith, indicating that the Supreme Court should have interpreted the Washington constitution to extend an absolute privilege to make complaints about police officers or about any governmental activity (such an interpretation would appear to protect even defamatory falsehoods such as those apparently before the Court in the Richmond case).

(3) WHERE JUVENILE'S TMV CHARGE AROSE FROM SAME ARREST AS NVOL CHARGE, SPEEDY TRIAL PERIOD BEGAN AT SAME TIME ON BOTH CHARGES – In State v. Harris, 130 Wn.2d 35 (1996), the State Supreme Court rules that where a juvenile was stopped for a traffic infraction and then found by the patrol officer to be in violation of two laws – (1) no valid operator's license (NVOL) and (2) taking a motor vehicle without permission (TMV) – the speedy trial period for prosecuting both charges began when the defendant appeared in district court on the NVOL charge and pleaded guilty to that charge.

The Harris Court applies the general rule for unjailed defendants that where multiple charges arise from the same conduct or incident (here, the arrest), and the charges are all subject to prosecution by the same prosecutorial authority in the state courts, the "speedy trial" deadline by which trial must occur begins to run at the time that defendant is first arraigned or otherwise held to answer any of the charges.

This rule applies even where there is a split in charges between juvenile court and district court, just as it applies in adult prosecutions where there is a split in charges between district court and superior court. An exception, not applicable in Harris, exists under the Supreme Court decision in State v. Fladebo, 113 Wn.2d 388 (1989), where a municipal court had exclusive jurisdiction over one of two multiple charges, and jurisdiction over the other charge was in the district court.

The Harris Court also notes that the prosecutor can ask for a continuance (including a retroactive continuance) under the speedy trial rule under some circumstances where evidence on a second charge is or was unavailable during the pertinent time period. In the Harris case, however, the prosecutor's argument for a continuance was rejected. The prosecutor in Harris argued that on the TMV charge (1) the State had needed to get more evidence that the vehicle was in fact stolen, and (2) the State also had needed to confirm the county where the arrest had occurred. The Supreme Court finds that this information was readily available early on, however, and did not justify a 150-day continuance.

Result: King County Juvenile Court adjudication of guilty of TMV reversed; charge dismissed.

LED EDITOR'S COMMENT: Law enforcement agencies should check with their county prosecutors for advice on how to avoid the speedy trial trap encountered in Harris.

(4) STRIKER SPEEDY TRIAL/SPEEDY ARRAIGNMENT RULE DOES NOT APPLY WHILE DEFENDANT OUT OF STATE UNLESS DEFENDANT INCARCERATED THERE – In State v. Hudson, 130 Wn.2d 48 (1996), State v. Cintron-Cartagena, 130 Wn.2d 48 (1996) and State v. Stewart, 130 Wn.2d 351 (1996), the State Supreme Court affirms three Court of Appeals decisions holding that the speedy trial/speedy arraignment rule of State v. Striker, 87 Wn.2d 870 (1976) does not apply while a defendant is out of state and not incarcerated there.

Criminal Rule (CrR) 3.3 governs time for trial and arraignment. Under the rule, defendants who are not in jail or subjected to conditions of release must be arraigned within 14 days after their initial appearance in court to answer the charges filed. Trial must then take place within 90 days after arraignment. Upon timely motion by a defendant, a trial will be dismissed for noncompliance with the "speedy trial" rule.

State v. Striker supplements the speedy trial rule. Where a defendant is amenable to process and there is a long delay between filing of the information and the defendant's first appearance, through no fault or connivance by the defendant, the time for trial starts to run on a date 14 days after the information is filed. This date is known as the "constructive arraignment date." Under Striker, the State must exercise due diligence and good faith in bringing an unincarcerated defendant to trial within 90 days of the constructive arraignment date. Noncompliance with Striker also will result in dismissal of charges upon timely motion by the defendant.

Now, in Hudson, Cintron-Cartagena and Stewart, the State Supreme Court has concluded that the Striker speedy trial/speedy arraignment rule did not apply to those defendants, because they were not "amenable to process" while they were in another state. Because the defendants were not amenable to process during their time out of state, the State was not obligated to exercise good faith and due diligence in bringing them to trial until they returned to Washington.

Defendants Stewart and Hudson argued that because they each had been temporarily detained by out-of-state officers while their Washington charges were pending, their cases were helped by the State Supreme Court decision in State v. Anderson, 121 Wn.2d 852 (1993) **Jan. '94 LED:07**. In Anderson, the State Supreme Court held that the State must act in good faith and with due diligence to use extradition procedures and bring a defendant speedily to trial after learning that the defendant is detained in either: (1) any federal prison or jail, or (2) a state prison or jail in another state. The State Supreme Court rejects the arguments by Stewart and Hudson, holding the Anderson rule does not apply to a person who is only temporarily detained by police in another state.

Result: Reversal of Court of Appeals decision reversing Jefferson County Superior Court decision that had dismissed VUCSA charges against Gabriel F. Stewart; case remanded for trial. Affirmance of King County Superior Court conviction of Pablo Cintron-Cartegena under indecent liberties statute and former first degree statutory rape law. Affirmance of Snohomish County Superior Court conviction of Thomas Merle Hudson for possession of controlled substances with intent to manufacture or deliver.

LED EDITOR'S NOTE: A list of other recent LED cases on the Striker speedy trial rule can be found in the December 1996 LED "subject matter index" under the topic "speedy trial." Included in the case citations in the December '96 subject matter index are citations to the earlier Court of Appeals decisions in Hudson, Cintron-Cartegena, and Stewart.

(5) "FRYE TEST" FOR ADMISSIBILITY OF NOVEL SCIENTIFIC EVIDENCE CONTINUES TO APPLY IN WASHINGTON CRIMINAL CASES; DNA "PRODUCT RULE" TESTIMONY ADMITTED – In State v. Copeland, 130 Wn.2d 244 (1996), State v. Cannon, 130 Wn.2d 313 (1996) and in State v. Jones, 130 Wn.2d 302 (1996), the State wins the murder and rape appeals at hand based on the strength of DNA evidence grounded in the "product rule."

The "Frye Test" is named after a 1923 federal court case. Frye holds that testimony about novel scientific methods is admissible only if the general scientific community accepts the underlying principles on which the methods are based. In 1993 the U.S. Supreme Court abandoned the Frye test for a sometimes more relaxed test under the federal "rules of evidence" governing expert testimony. As it has in the past, however, in the Copeland and Cannon cases the Washington Supreme Court rejects the prosecution's request that the Washington Court follow the federal court approach and abandon Frye.

However, the Court in Copeland then goes on to find DNA evidence more readily admissible than the Court's prior decisions had suggested. Thus, the Court holds that the scientific methodology underlying DNA RFLP evidence based on the "product rule" is now generally accepted within the scientific community. Therefore, if otherwise admissible, testimony about a probable DNA match grounded in the "product rule" can be heard by the trier of fact. The Cannon and Jones decisions follow the rationale of the Copeland decision.

Result: Affirmance of William Copeland's King County Superior Court convictions for premeditated first degree murder and felony murder with rape as the predicate offense. Affirmance of Victor Kenneth Cannon's King County Superior Court conviction of first degree rape. Affirmance of William Marlin Jones' King County Superior Court conviction of first degree rape and second degree robbery.

LED EDITOR'S CROSS REFERENCE NOTE: **See also the LED entry above at page 3 regarding the CrR 3.1 "Right to Counsel" issue in Copeland.**

(6) DANGEROUS DOG LAW DOES NOT ESTABLISH A STRICT LIABILITY STANDARD – In State v. Bash and State v. Delzer, ___ Wn.2d ___ (1996), the State Supreme Court by split vote rules that the dangerous dog statute at RCW 16.08.100(3) does not establish a strict liability standard.

Bash and Delzer owned two pit bulls which got out of their yard and attacked two persons. The dogs killed a 75-year-old man in a wheelchair in his back yard, and the dogs seriously injured a neighbor who tried to make a rescue. At issue in this case was whether the jury should be instructed that violation of subsection (3) of RCW 16.08.100 can be found without proof of any prior knowledge by a defendant of a dog's violent tendencies.

Subsection (3) of RCW 16.08.100 provides in pertinent part as follows:

> The owner of any dog that aggressively attacks and causes severe injury or death of any human, whether the dog has previously been declared potentially dangerous or dangerous, shall be guilty of a class C felony punishable in accordance with RCW 9A.20.021. In addition, the dog shall be immediately confiscated by an animal control authority, placed in quarantine for the proper length of time, and thereafter destroyed in an expeditious and humane manner.

Four justices join in a lead opinion declaring that in such a "dangerous dog" prosecution the State must prove that the defendant "knew or should have known" of the dog's dangerousness. Three justices join in an opinion declaring that the State should have to prove that the dog has "previously been declared" in a local administrative action to be dangerous. Finally, two dissenters assert their belief that subsection (3) of RCW 16.08.100 is a strict liability statute.

Result: case remanded to Yakima County Superior Court for trial; presumably, based on the above-described split vote, the jury will be instructed consistent with the lead opinion's "knew or should have known" standard.

(7) "RIGHT TO SILENCE" EXTENDS TO PRE-ARREST SITUATIONS; THEREFORE, STATE CANNOT CALL TO JURY'S ATTENTION DEFENDANT'S POST-CONTACT, PRE-ARREST SILENCE – In State v. Easter, 130 Wn.2d 228 (1996), the State Supreme Court rules that the right to silence under the Fifth Amendment of the U.S. Constitution applies to pre-arrest situations. The Court thus holds that the Fifth Amendment does not allow the State to call to the jury's attention that a defendant wouldn't talk after being contacted by police but before being arrested.

In Easter, the State had presented testimony from an investigating police officer that the vehicular assault defendant wouldn't talk to the officer and was apparently "cloaking" when the officer arrived on the scene of a two-car accident. Past precedents have held that the State cannot present evidence in its case-in-chief as to a defendant's silence: (1) following an arrest combined with Miranda warnings; or (2) following an arrest with no accompanying Miranda warnings. **Now, the Easter Court extends the rule to all post-contact situations. The Court holds that the State cannot present evidence in its case-in-chief as to silence in any post-contact situation, pre-arrest or post-arrest**.

The Easter Court explains that its ruling is limited to the proposition described in bold in the paragraph just above. Thus, the Easter Court explains that the State may introduce pre-arrest silence evidence about the accused of a non-testimonial nature, such as physical evidence, as well as demeanor and conduct evidence. Also, the Easter ruling does not address the right of the State to introduce pre-arrest silence evidence in order to impeach a defendant who testifies and puts his or her credibility at issue; presumably, the State would be able to use the pre-arrest silence to impeach in this situation.

Result: reversal of King County Superior Court conviction for vehicular assault; case remanded for new trial or dismissal.

(8) PBT TEST RESULT NOT ADMISSIBLE FOR ANY PURPOSE WITHOUT FRYE HEARING; HOWEVER, THE FACTS OF (A) ADMINISTRATION OF THE PBT TEST AND (B) OFFICER'S FAILURE TO PRESERVE RESULTS OF PBT TEST DO NOT TAINT SUBSEQUENT BAC TEST – In State v. Smith (Rodger), 130 Wn.2d 215 (1996), a unanimous State Supreme Court declares that the result of portable breath test (PBT) is "inadmissible for any purpose" in any DUI prosecution unless there is either: (1) a Frye hearing on the PBT in the particular case, or (2) general approval of the device and its administration by the state toxicologist. However, the Court upholds defendant's DUI conviction because there was nothing illegal or prejudicial to defendant's rights in the fact that a voluntary roadside PBT test was conducted prior to defendant's arrest.

Defendant Smith had been stopped by a WSP Trooper at 1:00 a.m. after defendant had veered into the trooper's lane and nearly hit him head on. In his initial contact with Smith, the trooper observed several actions indicating Smith's lack of finger dexterity and manifesting that Smith may be intoxicated. Then, after Smith failed field sobriety testing, the trooper asked Smith if he would voluntarily take a PBT test. Smith took the test; the trooper did not record the result of the test, and later at trial the trooper could not remember the PBT result.

Smith was then arrested for DUI and transported for BAC testing. Smith registered 0.12 on the BAC test. Smith was charged with DUI, and, prior to trial, moved to suppress the BAC test result on grounds that the PBT test was an illegal search in violation of implied consent law. Smith also argued that the trooper's failure to preserve the result of PBT testing violated his due process rights. Smith lost his motion and was subsequently convicted of DUI. After Smith lost his appeal to the Court of Appeals [see State v. Llewellyn, 78 Wn. App. 788 (Div. III, 1995) **August '96 LED: 20**], the State Supreme Court accepted review of the case.

PBT evidence admissibility: The State Supreme Court begins its analysis by noting that the State toxicologist has not approved the PBT for measuring breath alcohol. The Court declares that until and unless the toxicologist does so, a PBT result will not be admissible for any purpose in any case without a Frye hearing in that case where the government must show general acceptance in the scientific community of the scientific principles underlying the device.

Implied consent implications of PBT administration in the field: Smith argued on appeal that the trooper should have given him an implied consent warning before administering the PBT, and that this failure unlawfully tainted the subsequent BAC testing. Noting that the trooper had accurately advised Smith that PBT tests (i) were not required by law, (ii) were voluntary, and (iii) could not be used against him in a court of law, the Supreme Court finds no support for Smith's theory that there was any impropriety in the field PBT testing. The Supreme Court also points

out that Smith did not make any showing as to how the PBT testing might have affected his decision to take the BAC test.

Fifth Amendment: The Supreme Court points out that, because PBT testing is a taking of physical, nontestimonial evidence, Miranda requirements do not apply to such testing.

Probable Cause To Arrest: The Supreme Court indicates that a PBT result cannot be used to help establish probable cause to arrest unless the State makes the necessary Frye showing. However, the Court then goes on to declare that the following facts gave the trooper probable cause to arrest Smith for DUI without considering the PBT result:

> Smith's car had nearly struck [the trooper's] vehicle head-on. [The trooper] also observed the smell of alcohol on Smith's breath, his lack of finger dexterity, and his failing several field sobriety tests.

Due Process, Preservation-of-Evidence: Smith asserted that he recalled seeing an "8" on the field PBT device, that this might have been a .08 test result, and that if the trooper had recorded the PBT result, this would have allowed Smith to better argue his DUI case to the jury. The Supreme Court rejects Smith's due process, preservation-of-evidence theory for several reasons. First, the Court notes that where a defendant is alleging only that the State destroyed potentially exculpatory evidence, he must prove that the State acted in bad faith; no bad faith was suggested in this case. Second, Smith could not show that the lost PBT evidence was material evidence, because, as noted above, PBT evidence is inadmissible without a Frye hearing, which did not occur in this case. A third defect in Smith's destruction-of-evidence theory is that he had other means of getting additional breath tests, and he was so advised in the trooper's later implied consent warnings prior to administration of the BAC test.

Result: Affirmance of Court of Appeals decision which had reversed Spokane County Superior Court decision; Spokane County District Court verdict of guilty reinstated; DUI case remanded for sentencing.

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WASHINGTON STATE COURT OF APPEALS

HOUSER RULE REQUIRING "MANIFEST NECESSITY" FOR INVENTORY SEARCHES OF MV TRUNKS NOT APPLICABLE WHERE MV HAS TRUNK RELEASE BUTTON IN INTERIOR

State v. (Ron) White, 83 Wn. App. 770 (Div. I, 1996)

Facts:

Ron White's vehicle was stopped by a Bellingham police officer (Klein) for running a stop sign. While investigating inconsistencies in White's story about White's identity and the ownership of the vehicle, the officer learned that White's driver's license was revoked and that White had six outstanding FTA warrants. At that point the officer placed White under arrest. What happened after that is described by the Court of Appeals as follows:

> Another officer arrived to assist Klein. They searched the passenger compartment of White's car, including the unlocked glove compartment. There they found several spoons covered with white residue and a glass tube with burned vegetable matter in it. They also saw an automatic trunk release button in the glove compartment, which they pushed to open the trunk. Klein found a fishing tackle box in the trunk, containing drug paraphernalia, green vegetable matter and packets of vacuum-sealed U.S. currency totaling $5,400. In one of the packets, Klein noticed a solid white item about the size of a golf ball, which turned out to be over 20 grams of cocaine. At White's suppression hearing, Klein testified that the police department's inventory policy requires officers to inventory all accessible areas of the car, including the trunk, and to open any unlocked containers.

Proceedings: (Excerpted from Court of Appeals opinion)

> The State charged White with unlawful possession of a controlled substance with intent to deliver in violation of RCW 69.50.401(a)(1) and driving while his license was suspended or revoked in violation of RCW 46.20.342. White moved to suppress the items Klein found in his trunk. He stipulated that he was lawfully stopped and that Klein had authority to impound his car. He argued only that the police exceeded the scope of the otherwise lawful inventory search when they opened his locked trunk and examined its contents. The trial court agreed and suppressed the evidence Klein discovered in the tackle box.

ISSUES AND RULINGS: (1) Is the rule stated in 1980 by the Washington Supreme Court in State v. Houser restricting trunk inventory searches still valid; i.e., has the Houser rule not been impliedly overruled by subsequent U.S. Supreme Court decisions? (ANSWER: Yes, the Houser rule is still valid); (2) Does the rule of State v. Houser, which prohibits police from searching the trunk area of a motor vehicle during an inventory search unless there is a "manifest necessity" to do so, apply where the motor vehicle's trunk can be opened by a release button in the vehicle's interior? (ANSWER: No, rules a 2-1 majority; the accessibility of the trunk by means of the release button makes the Houser rule inapplicable). Result: Whatcom County Superior Court suppression ruling reversed; case remanded for trial.

ANALYSIS:

IS STATE V. HOUSER STILL VALID?

The Court of Appeals rejects the argument offered by amicus, Washington Association of Sheriffs and Police Chiefs, that the 1980 Washington Supreme Court decision in State v. Houser (see Court's discussion about Houser excerpted below): (A) was based entirely on U.S. Supreme Court interpretations of the Fourth Amendment, and (B) is no longer valid because the U.S. Supreme Court has clarified that under the Fourth Amendment vehicle inventory searches may extend to locked vehicle trunks so long as agency policy or established and routinized practice allows for searching locked vehicle trunks during otherwise lawful inventory searches. The Court of Appeals in White declares that Houser was decided under the Washington State Constitution, and therefore more recent U.S. Supreme Court interpretations of the Fourth Amendment on this issue are irrelevant.

TRUNK RELEASE EXCEPTION TO STATE V. HOUSER?

The Court of Appeals first notes that the facts of this case might raise an issue of whether the impounding of White's vehicle was lawful. However, White, through his attorney, had expressly waived argument on the impound issue at trial, and the Court of Appeals refuses to address that issue.

Turning to the "scope of inventory" issue, the Court of Appeals analysis is as follows:

> [W]e look solely to State v. Houser, and other cases governing inventory searches of vehicles to determine the permissible scope of those searches. In Houser, the court noted that it had "long held that a noninvestigatory inventory search of an automobile is proper when conducted in good faith" to find, list and secure property belonging to a detained person from loss during his or her detention and to protect the police and temporary storage bailees from liability due to dishonest claims of theft. Concerned that allowing the police to conduct warrantless searches of vehicles could lead to abuse, the Houser court limited the scope of inventory searches "to those areas necessary to fulfill its purpose." Because the justification for permitting a warrantless inventory search of a vehicle is to guard against theft and false theft claims, the court held that the scope of the search "should be limited to protecting against substantial risks to property in the vehicle" and not be justified on the basis of remote risks.
>
> The police opened Houser's trunk with a key as part of their inventory search of his car. The court held that this exceeded the scope of the inventory search exception to the warrant requirement. It reasoned that permitting police to open a locked trunk to inventory its contents does not implicate the valid purpose of an inventory search because items locked in a trunk are not in great danger of theft:
>
> > [P]roperty locked in the trunk of an automobile . . . presents no great danger of theft. It is apparent that a would-be thief would be unaware of the existence of property of value in the trunk. Indeed, countless numbers of automobiles with locked trunks are daily left on the city streets of this country without unreasonable risk of theft. Accordingly, we think that any need to protect property located in a locked trunk is outweighed by the countervailing privacy interests of the individual in the enclosed area of the trunk.
>
> Houser did not establish an absolute prohibition on searching a vehicle's trunk during an inventory search. Rather, it held that "an officer may not examine the locked trunk of an impounded vehicle in the course of an inventory search absent a manifest necessity for conducting such a search." The State has not argued that the search of White's trunk was justified by a manifest necessity, nor did the trial court find that one existed. Thus, we must decide whether the police exceeded the scope of the inventory search exception to the warrant requirement when they opened White's trunk with the automatic release button and searched its contents.
>
> The parties framed this issue in terms of whether a trunk that can be opened from the passenger compartment is "locked" or "unlocked" for the purposes of Houser. We decline to resolve this issue on semantics because it is clear that

the focus of the Houser court's reasoning was not whether the trunk was locked, but whether the potential for theft and false claims against the police department justified the intrusion into the defendant's expectation of privacy in his car trunk. Under Houser, the question of whether these risks are substantial or remote must guide our analysis. The risk of theft or unfounded claims becomes substantial when a car's trunk can be opened from an easily-accessible area of the passenger compartment. Implicit in the justification for warrantless inventory searches of the passenger compartment, including its unlocked glove compartment, is the recognition that these are areas a would-be thief can easily get into. Logically, if a thief can get into the passenger compartment of a vehicle, he or she can get into the trunk just as easily if it can be opened with a release button located in that same passenger compartment. Because it is no great secret that some cars have trunk release levers in the glove compartment or by the driver's seat, the danger of theft of items left in the trunks of those cars is far greater than is the case if a car trunk can only be opened with a key. *[COURT'S FOOTNOTE: For these reasons, the analysis might well be different if the officers found a trunk key in the car or unlocked glove compartment and there were no trunk release lever inside the car. The key could be secured separately from the car, thereby reducing the possibility of theft to the rather unlikely level presented to the Houser court. That a key was found in White's car after the search was completed does not change our analysis because there was also a trunk release lever in the unlocked glove compartment.]* Thus, the policy concerns the Houser court relied on, together with logic and common sense, lead us to conclude that this danger of theft outweighed White's reasonable expectation of privacy in the contents of his trunk. The police, therefore, did not exceed the proper scope of the inventory search when they opened his trunk with the release button and inventoried the items in it.

Although Houser could be read to establish a bright-line rule prohibiting the police from searching the interior of a locked trunk regardless of its accessibility to a would-be thief, we decline to read it this way because applying a bright-line rule in this case would frustrate the purposes of the inventory search exception to the warrant requirement. In our view, the Bellingham Police Department would have been hard-pressed to explain to White what happened to the $5,400 he had in his trunk had it turned up missing. As Bellingham Officer Richard Nolte explained at the suppression hearing, the police department has had claims filed against it because of break-ins at the impound lot it uses. He observed that, if the police had not inventoried the contents of White's trunk, he or the rightful owner of the property could "come back [to the officer who impounded the car] and say, . . . " There was $5,000 in the vehicle. Where is it now?"

Focusing on the accessibility of items in the trunk rather than whether or not it was locked is consistent with South Dakota v. Opperman [1976], the leading U.S. Supreme Court case on this issue. There, the court rejected the argument that the scope of a vehicle inventory search should be limited to items in plain view and focused on the accessibility of the car inventoried. Opperman upheld a warrantless search of an unlocked glove compartment because it was an area that "vandals would have had ready and unobstructed access [to] once inside the car."

> In this respect we question the Houser court's reliance on the observation that allowing the police to search trunks is not necessary to effect the purpose of an inventory search because "[I]t is apparent that a would-be thief would be unaware of the existence of property of value in the trunk." That people commonly carry valuables in their trunks is demonstrated by this case. White had over $5,000 cash in his trunk when he was stopped. We are also aware of numerous criminal cases where items of value are discovered in vehicle trunks. We have trouble understanding the relevance of the Houser court's observation that "countless numbers of automobiles with locked trunks are daily left on the city streets of this country without unreasonable risk of theft" to the situation where a car is impounded after its driver is arrested in transit. Because a person drives around with valuables in his trunk does not necessarily mean he would leave them there after he parked. As Justice Powell observed in Opperman, people may leave valuables in their car temporarily that they would not leave there for longer periods of time:
>
> It is argued that an inventory is not necessary since locked doors and rolled-up windows afford the same protection that the contents of a parked automobile normally enjoy. But many owners might leave valuables in their automobile temporarily that they would not leave there unattended for the several days that police custody may last.

[Text, one footnote, some citations omitted]

DISSENTING OPINION:

Judge Becker dissents, arguing that the 1980 Houser decision does not allow for the accessing of a trunk in any inventory search unless police can show a "manifest necessity" to do so.

STATUS: Defendant Ron White's motion for reconsideration by the Court of Appeals has been denied. At LED deadline, White had not yet filed a petition for review in the State Supreme Court.

LED EDITOR'S COMMENT:

Defendant White will probably petition for review by the State Supreme Court, which is likely to grant review to clarify the status of the Houser rule which purports to require "manifest necessity" to justify trunk checks during vehicle inventories.

Assuming that the White case ends up in the State Supreme Court, we think that it is a close question as to what that court will do with the issue. There is no question in our mind that the 1980 State Supreme Court Houser decision's "manifest necessity" rule is flatly contrary to the U.S. Supreme Court decision in Colorado v. Bertine, 479 U.S. 367 (1987) April '87 LED:04. We read Bertine as permitting trunk and container searches in vehicle inventories, so long as established agency practice or policy is to routinely search such areas during inventories.

There is also little question in our mind that, contrary to the assertion by the Court of Appeals in White, any future State Supreme Court decision on the lawful scope of

inventory searches will concede that the Houser decision was entirely grounded in the Fourth Amendment and was not grounded in the Washington State Constitution. (See our comment in January 1991 LED at page 7). However, we fear that there is at least a 50-50 chance that the State Supreme Court will make a "new" independent grounds reading of Washington Constitution's article 1, section 7 and thus resurrect the 1980 Houser decision as a state constitutional ruling.

Meanwhile, Washington law enforcement agencies should consult with their legal advisors and prosecutors. There may be varying advice as to the current state of the law in this subject area. Some may advise that the White/Houser rule must be followed: i.e., in the absence of an interior trunk release button, the trunk's contents should not be inventoried in the absence of a "manifest necessity" to do so. On the other hand, other legal analysts may justifiably view the U.S. Supreme Court decision in Colorado v. Bertine as setting the standard for Washington agencies (Bertine having impliedly overruled Houser, and White arguably missing this point).

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ATF LETTERS ADDRESS NEW FEDERAL GUN BAR RE PERSONS WITH CONVICTIONS OF "MISDEMEANOR CRIME(S) OF DOMESTIC VIOLENCE"

In last month's LED at page 22, we noted that in federal legislation which became effective September 30, 1996, Title 18 of the United States Code was amended to extend federal firearms restrictions to any person convicted in a state or federal court of a "misdemeanor crime of domestic violence."

On November 26, 1996, BATF Director, John W. Magraw, sent out separate letters on this new federal legislation to: (1) state and local law enforcement officials, (2) federal firearms licensees, and (3) the public. The November 26 letter to state and local law enforcement officials explains as follows ATF's interpretation of the term "misdemeanor crime of domestic violence":

> As defined in the GCA [Gun Control Act], a "misdemeanor crime of domestic violence" means an offense that:
>
> (1) is a misdemeanor [or gross misdemeanor] under Federal or State law; and
>
> (2) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.
>
> This definition includes all misdemeanors that involve the use of attempted use of physical force (e.g., simple assault, assault and battery) if the offense is committed by one of the defined parties. This is true whether or not the State statute or local ordinance specifically defines the offense as a domestic violence misdemeanor. For example, a person convicted of misdemeanor assault against his or her spouse would be prohibited from receiving or possessing firearms or ammunition.

> Moreover, the prohibition applies to persons convicted of such misdemeanors at any time, even if the conviction occurred prior to the new law's effective date, September 30, 1996. As of the effective date of the new law, such a person may no longer possess a firearm or ammunition. However, with respect to all persons, a conviction would not be disabling if it has been expunged, set aside, pardoned, or the person has had his civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) AND the person is not otherwise prohibited from possessing firearms or ammunition.

The November 26 ATF letter goes on to explain at length that the legislation applies to law enforcement officers. In light of the retroactive effect of the legislation and its application to law enforcement officers, state and local law enforcement officers in Washington with domestic violence misdemeanor convictions incurred at any time are currently disqualified from firearm possession under federal law unless and until they obtain restoration of firearms rights under RCW 9.41.040(4)(b)(ii). Under the referenced RCW subsection, persons with misdemeanor DV convictions are eligible for restoration of rights if they have clean records for a three-year period following the conviction.

The November 26 ATF letter also discusses the implications of the new legislation under "Brady". As we have previously discussed in the LED, Washington State has qualified "Brady-alternative" status. This means that handgun purchasers with Washington CPL's issued on or after July 1, 1996 are exempt from the federally mandated five-day waiting period. See discussion in August '96 LED at page 7. Your LED Editor's view, based on our legal research and on consultation, is that the new federal legislation does not affect this "Brady-alternative" status for post-July 1, 1996 Washington CPL-holders.

It must be recognized that a few individuals with Washington CPL's lawfully issued on or after July 1, 1996 might be disqualified from federal firearms possession. That is because those persons with misdemeanor domestic violence convictions for crimes committed before July 1, 1993 (assuming no subsequent restoration of firearms rights) will be disqualified from firearms possession and handgun purchase under federal law even though not disqualified in any respect under Washington gun laws. If these persons don't reveal to the federally licensed gun dealer their DV disqualifying conviction, they will be able to present their Washington CPL and walk out of the store with a handgun without a waiting period, and their disqualifying misdemeanor DV conviction will only be discovered later by the law enforcement agency. *[Note, however, that once federal gun purchase forms are revised to accommodate the 1996 federal legislation changes, such persons will not be able to lawfully purchase a handgun from a federally licensed dealer without committing a federal crime -- they will be required to affirm that they have no federally disqualifying misdemeanor domestic violence convictions.]*

In order to increase the likelihood that persons issued Washington CPL's in the future will be aware of the difference between state and federal disqulalifiers for misdemeanor DV convictions, Washington agencies issuing CPL's should consider presenting to CPL applicants a written explanation of the pertinent differences in state and federal law relating to disqualification for misdemeanor DV conviction. To that end, after consultation with your LED editor and others, firearms law experts, Steve Perry (Edmonds Police Department) and Barb Bader (Lynnwood Police Department), sent out a mid-December 1996 teletype to all Washington law enforcement agencies suggesting the wording for such a "Notice to Concealed Pistol Applicants." The suggested notice in the teletype contains a signature line for the CPL

applicants. Washington agencies must recognize that an applicant's refusal to sign the notice would not justify the law enforcement agency's denial of the CPL; in the event of an applicant's refusal to sign, the agency may wish to simply record that fact, plus the fact that notice was given to the particular applicant on that date.

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NEXT MONTH

The February 1997 LED will include an entry on the November 1996 decision of the United States Supreme Court in Ohio v. Robinette. In Robinette the U.S. Supreme Court addresses an issue which we addressed in a brief article in the October '96 LED at pages 19-21 ("Requesting Consent to Search During a Traffic Stop--Is It a Seizure?"). The Supreme Court holds in Robinette that under the Fourth Amendment of the U.S. Constitution there is no bright line "clear break" requirement for requesting consent following a traffic stop. In our February 1997 LED entry, we will explain why we continue per our October '96 article to suggest that Washington officers seeking consent in this factual context should take the "clear break" approach.

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The Law Enforcement Digest is edited by Assistant Attorney General, John Wasberg, Office of the Attorney General. Editorial comment and analysis of statutes and court decisions express the thinking of the writer and do not necessarily reflect the opinion of the Office of the Attorney General or the Washington State Criminal Justice Training Commission. The LED is published as a research source only and does not purport to furnish legal advice.